

JACOB L. HAFTER, ESQ.  
Nevada State Bar No. 9303  
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Pro Se Plaintiff

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JACOB HAFTER, ESQ.,

Plaintiff,

vs.

ROB BARE, in his official capacity; DAVID  
CLARK, in his official capacity; GLENN  
MACHADO, in his official capacity; PHIL  
PATTEE, in his official capacity; DOE  
Defendants I through X, inclusive; and ROE  
CORPORATIONS A through Z, inclusive,

Defendants.

Case No.: 2:10-cv-00553-PMP-LRL

**PLAINTIFF'S RESPONSE TO  
DEFENDANTS' MOTION TO DISMISS**

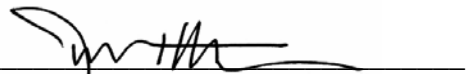
COMES NOW, Plaintiff, JACOB HAFTER, ESQ., hereby his Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint, Document 33 ("Motion"). This Opposition is made pursuant to the Federal Rules of Civil Procedure, Local Rule 7-2, the attached memorandum of points and authorities, the exhibits hereto, the records and pleadings on file with the Court, of which judicial notice is respectfully requested pursuant to Fed. R. Evid. 201, and any oral argument entertained by the Court at the hearing set on this Motion.

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1 DATED this 25<sup>th</sup> day of October, 2010.

2  
3 By:

  
Jacob L. Hafter, Esq.  
Nevada Bar Number 9303  
7201 W. Lake Mead Blvd, Suite 210  
Las Vegas, Nevada 89128

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8 **I.**

9 **INTRODUCTION**

10 Defendants keep trying to frame this case as one related to the State of Nevada's right  
11 to discipline attorneys; it is not. This case is a civil rights case based upon the State Bar of  
12 Nevada's violation of Plaintiff's first amendment rights. This case seeks to determine whether  
13 the State Bar may initiate a discipline grievance for political speech, not to address the merits  
14 of the Bar's grievance against Plaintiff. This Court cannot allow the State Bar to avoid  
15 accountability for their attempt, whether intentional or not, to discipline a political candidate  
16 for his speech. Not only has Plaintiff been sanctioned, but his due process rights have been  
17 deprived, and his ability to serve on the Southern Nevada Disciplinary Board of the State Bar  
18 has been interrupted.

19 Defendants bring their Motion on the grounds that the Younger abstention doctrine  
20 prevents this Court from interfering with their ongoing disciplinary process, now that a formal  
21 complaint has been filed against Plaintiff. Plaintiff does not disagree with this point. Plaintiff,  
22 however, recognizes that there is a difference between abstention and dismissal, and that  
23 nothing within the Younger doctrine prevents this case from proceeding with respect to  
24 Defendants' due process violations of Plaintiff's rights. Accordingly, Plaintiff respectfully  
25 requests that this Court DENY Defendants' Motion. At the very least, Plaintiff respectfully  
26 requests that his Court allow Plaintiff to either amend his complaint or stay these proceedings  
27 until the state judicial process has been completed.

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## II.

### LEGAL ARGUMENT

#### A. STANDARD FOR MOTION TO DISMISS

Defendants have requested this Court dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(1) on the grounds that the Court lacks subject matter jurisdiction. “In reviewing the Rule 12(b)(1) dismissal, we must accept all factual allegations in the complaint as true.” Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 826 (9th Cir.2004) (citations omitted). In a 12(b)(1) analysis “[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” Assoc. of Am. Med. Colls. v. United States, 217 F.3d 770, 778 (9th Cir.2000) (*quoting Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673 (1994)).

Dismissal of a complaint is disfavored and should only be granted in “extraordinary” cases. Calstar LLC v. First Union Nat’l Bank, 35 Fed. Appx. 602, \*\*1 (9<sup>th</sup> Cir. 2002), citing United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir.1981). However, “[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” Id., citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.1988). If a complaint lacks facts to support a legal theory, but those facts could easily be supplied, the complaint should not be dismissed without leave to amend. *See Id.*, citing Fed.R.Civ.P. 15(a) (stating that leave to amend should be “freely given”); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.2000) (en banc) (“[A] district court should grant leave to amend ... unless it determines that the pleading could not possibly be cured by the allegation of other facts.”)(*quoting Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995))).

#### B. ABSTENTION SHOULD NOT APPLY IN THIS CASE

The United States Supreme Court has stated that abstention of the federal courts is the *exception*, rather than the rule. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). This very Court has stated that “[a]bstention under Younger ‘is a

jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism.”  
 see Document 13-1, citing San Jose Silicon Valley Chamber of Commerce Political Action  
Comm. v. City of San Jose, 546 F.3d 1087, 1091 (9th Cir. 2008). “[T]he limited circumstances  
 in which abstention by federal courts is appropriate remain the exception rather than the rule.”  
Id., citing San Jose at 1092 (quotation omitted). Principals of federal abstention “are not rigid  
 pigeonholes into which federal courts must try to fit cases.” Pennzoil Co. v. Texaco, Inc., 481  
 U.S. 1, 11, n. 9, 107 S.Ct. 1519, 1526, n. 9, (1987). Further, and most importantly as it relates  
 to the basis for which Defendants bring the instant Motion to Dismiss, the Supreme Court has  
 rejected Younger as a question of subject matter jurisdiction. See New Orleans Public Service,  
Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358 (1989) (“NIOPSI”) and Ohio  
Civil Rights Comm’n v. Dayton Christian Schools, Inc., 477 U.S. 619, 626 (1986).

Under very limited circumstances, the federal courts should *abstain from interfering*  
*with ongoing state court proceedings*. See Colorado River, supra. Included are the  
 circumstances set forth in Younger. Middlesex County Ethics Comm. V. Garden State Bar  
Ass’n sets forth a three part test for determining the applicability of Younger: 1) there are  
 ongoing state proceedings that are judicial in nature; 2) the state proceedings implicate  
 important state interests; and 3) the state proceedings afford an adequate opportunity to raise  
 federal claims. 457 U.S. 423, 432 (1982).

At this point, however, Plaintiff is no longer asking this Court to interfere with the  
 existing proceeding; rather, Plaintiff is seeking damages for the harms that have already  
 occurred. Plaintiff is defending himself in the on-going disciplinary matter. Plaintiff is  
 highly concerned about his ability to raise the constitutional issues he has with the discipline in  
 that matter, however, such will be the subject of an appeal, in some form, not injunctive relief  
 from this Court. Such does not, however, prevent Plaintiff from recovering for the wrongs that  
 have occurred in this case.

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**C. PLAINTIFF HAS RAISED CLAIMS UPON WHICH RELIEF CAN BE GRANTED**

Defendants have harmed Plaintiff. Plaintiff has pled those wrongs sufficiently. For example, Plaintiff has pled the following:

32. On April 13, 2010, at around 10:30 am, Benjamin Spillman, a reporter for the Las Vegas Review Journal, called Mr. Hafter at his office.

33. During that call, Mr. Spillman informed Mr. Hafter that Phil Pattee, Esq., assistant bar counsel for Defendant, stated that not only was Defendant not investigating Masto for the allegations of misconduct, but that “an investigation and a grievance file has been opened in relation to Mr. Hafter himself.”

Document 32 at 6. Mr. Pattee’s actions were a violation of the Supreme Court Rules related to the confidentiality of a disciplinary matter. This violation of Plaintiff’s right to confidentiality is not an on-going violation. It was done and over once Defendant Pattee spoke to the Review Journal reporter. The breach of confidentiality caused the matter to be improperly tried in the press, depriving Plaintiff of adequate due process in defending the claim in a private matter. Such deprivation can be addressed by this Court, without concern about the abstention doctrine.

Plaintiff has also suffered other harms which he has adequately pled. For example, Plaintiff also pled that “[s]ince April 13, 2010, Hafter has been banned by Defendant Clark from performing his duties related to sitting on the Southern Nevada Disciplinary Board of the State Bar of Nevada.” Complaint at ¶53. In his Motion, Defendant Clark has acknowledged that he interfered with Plaintiff’s service as a member of the Southern Nevada Disciplinary Board of the State Bar when he said that he “absolutely” prevented Plaintiff from servicing as a hearing panel member for a disciplinary hearing. Document 33 at 16. Defendant Clark then tried to justify such in his Motion. As this is ultimately a dispute of fact, however, such must survive a motion to dismiss.

Defendant Clark then tried to suggest that even if he did improperly prevent Plaintiff from serving on the disciplinary board, such does not interfere with Plaintiff’s property rights.

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1 Such is a legally impotent argument and the fact that it comes from Bar Counsel is outright  
 2 shocking. Professional licenses have been deemed to be property rights in the State of Nevada.  
 3 See e.g., Gallo v. U.S. Dist. Court For Dist. of Arizona, 349 F.3d 1169 (9<sup>th</sup>.Cir.,2003) (citing In  
 4 re Poole, 222 F.3d 618, 620 (9th Cir.2000); Sabow v. United States, 93 F.3d 1445, 1456 (9th  
 5 Cir.1996); and Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979)). The  
 6 courts have further stated that “a professional license, once conferred, constitutes an  
 7 entitlement subject to constitutional protection.” Id. at 1179.

8 With a professional license comes several various rights. The ability to serve on a  
 9 disciplinary board in the State of Nevada is a right that comes with membership to the bar.  
 10 S.C.R. 103. Once appointed, “[m]embers of the disciplinary boards shall serve at the pleasure  
 11 of the board of governors, or for a term of three years, subject to reappointment for three  
 12 additional terms.” S.C.R. 103(2). Petitioner was selected to serve on the Southern Nevada  
 13 Disciplinary Board of the State Bar. Accordingly, Petitioner has a right to serve, either at the  
 14 pleasure of the Board of Governors or for his term. Defendants, as bar counsel, cannot  
 15 arbitrarily impinge on that right. Plaintiff has alleged, however, in his Second Amended  
 16 Complaint, that the Defendants have interfered with that right. Accordingly, such is a  
 17 question for a trier of fact and should proceed to discovery.

#### 18 IV.

#### 19 CONCLUSION

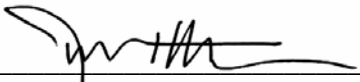
20 Whenever the government takes action to suppress political speech, it is a grave  
 21 concern to all Americans. The instant action comes before the Court as a result of the State  
 22 Bar’s attempts to investigate and prosecute Plaintiff, an attorney and former candidate for  
 23 political office, as a result of comments he made regarding the incumbent, against whom he is  
 24 running. In doing so, Plaintiff suffered numerous harms for which he seeks recourse through  
 25 this action. For the above reasons, Plaintiff respectfully requests that this Court allow this  
 26 matter to proceed.  
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1 Dated this 25<sup>h</sup> day of October, 2010.

2  
3 By: \_\_\_\_\_



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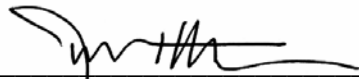
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of October, 2010, I, personally, did electronically transmit the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing on the following CM/ECF registrants:

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600 E. Charleston Blvd  
Las Vegas, Nevada 89104  
davidc@nvbar.org

  
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